



ILLINOIS COMMERCE COMMISSION

May 25, 2012

Illinois-American Water Company	:	
	:	11-0767
Proposed general increase in water	:	
and sewer rates.	:	SERVED ELECTRONICALLY

NOTICE OF ADMINISTRATIVE LAW JUDGE'S RULING

TO ALL PARTIES OF INTEREST:

Illinois-American Water Company ("IAWC") filed a "Motion to Strike Portions of the Testimony of Ralph C. Smith" ("Motion to Strike" or "Motion"). IAWC therein raises a number of objections, including failure to show comparability, to specified portions of Mr. Smith's direct and rebuttal testimony. Mr. Smith is an expert witness called by the People of the State of Illinois, by the Illinois Attorney General ("AG"). The AG filed a response in opposition to the Motion. IAWC filed a reply thereto.

The AG argues, among other things, "Almost all of the disputed testimony relates to public documents produced in the context of public rate case proceeding in a sister state where IAWC's affiliates fully participated[.]" and that "[t]he portions of testimony that IAWC moves to strike are highly relevant." (AG response at 1-2)

According to the AG, Mr. Smith "offers expert accounting testimony that addresses, *inter alia*, substantial increases to ratepayers for Business Transformation operating expenses, and various tax and accounting decisions sought by IAWC that Mr. Smith appropriately reviewed for reasonableness and prudence. In considering how to address these complex issues, Mr. Smith reviewed various sources, including the decisions of other commissions in sister states that decided similar questions presented by IAWC's sister companies." (*Id.* at 9-10)

The AG also argues, "Mr. Smith can fairly present and rely on information provided about the same project by other AWWA affiliates in making his recommendations." The AG adds, "This is material that a reasonable and prudent regulatory accountant is entitled to rely on and present to the Commission." (*Id.* at 3)

The testimony and arguments have been reviewed. One difficulty with the "rely on and present" argument is that the phrase seems to blur, at least to some degree, the distinction between the two terms within it. In forming opinions or inferences, an expert may rely on facts, data or opinions of a type reasonably relied upon by experts in the field, even if those facts, data or opinions are not admissible in evidence. *Wilson v. Clark*, 84 Ill. 2d 186 (1981); *People v. Shinohara*, 375 Ill. App 3d 85 (2007).

However, the facts, data or opinions reasonably relied on by an expert are not by virtue thereof substantive evidence. That is, reliance by an expert on facts, data or opinions, even if appropriate, does not somehow make those relied-upon items admissible. Rather, reasonably relied-upon facts, data or opinions constitute substantive evidence only if otherwise admitted into evidence. Thus, the facts, data or opinions relied upon by the expert but not otherwise admitted may be considered in assessing the appropriate weight to be accorded the expert's opinion but not for their truth. *People v. Scott*, 148 Ill. 2d 479 (1992); *City of Chicago v. Anthony*, 136 Ill. 2d 169 (1990). (See also, *Cleary and Graham's Handbook of Illinois Evidence*, 9th Edition, §703.1)

In this case, there is not very much argument regarding the reliance/admissibility distinction discussed above, which complicates the process of analyzing the arguments and making a ruling. For example, it is not altogether clear from the arguments whether or to what extent IAWC's objections relate to Mr. Smith's reliance on the documents in question, or conversely, whether or to what extent the AG's claims that the testimony is admissible is attributable to the witness' reliance on them. In addition, there was evidence adduced at the hearings that pertains to some portions of the testimony at issue.

In any event, from a review of the testimony, it appears that the items relied upon by Mr. Smith are of a type reasonably relied upon by experts in the field. As such, his testimony reflecting his reliance on them, regardless of their admissibility, will not be stricken. Any objections to such reliance go to the weight, which may be further argued in the briefs. As indicated above, however, the facts, data or opinions reasonably relied on by an expert are not by virtue thereof substantive evidence.

Several of the objections relate to testimony about a pending California proceeding. Mr. Smith's testimony addresses the treatment of costs associated with a "business transformation project." (AG 2.0 at lines 589-595, 859-905; AG 4.0 at lines 207-236) The portions to which IAWC objects consist in part of summaries of or excerpts from testimony -- not presented by IAWC or an affiliate -- and a proposed decision in the California proceeding. This testimony from Mr. Smith is not admitted for the substance or truth thereof. The admissibility of those items for such purposes has not been established over IAWC's hearsay objection.

Another set of objections relates to testimony about cash working capital. (AG Ex. 2.0 at lines 1240-1243, 1264-1283; AG 4.0 at lines 454-527 and AG Exhibit 2.3 at pages 39-47) IAWC asserts in part that portions of this disputed testimony and Exhibit 2.3 discuss or include discovery responses in a proceeding in Pennsylvania. It is not clear from the filings whether these responses, attributed to an affiliate of IAWC, were part of the evidentiary record in that proceeding. Parties are given until June 4, 2012 to file supplemental responses on this point if they wish to do so.

With regard to the full sentence beginning on line 483 of Exhibit 4.0, and the one beginning on line 491 of Exhibit 4.0 which first appeared on line 1280 of Exhibit 2.0, the parties are given until June 4, 2012 to file supplemental responses to update their arguments based on evidence adduced at the hearings in Docket 11-0767, if they wish to do so.

IAWC moves to strike lines 2133 through 2153 in AG Exhibit 2.0, as well as lines 966 through 978 and lines 987 through 991 of AG Exhibit 4.0 which are part of Mr. Smith's testimony about the "Domestic Production Activities [Tax] Deduction." The motion is denied with respect to these passages. While not technically involving an admission, it nevertheless seems appropriate under the circumstances to allow the expert witness to compare a position on the issue purportedly taken on the record by a water utility affiliate of IAWC in the cited proceeding to that proposed by IAWC in this proceeding. The objections go to the weight, which may be further argued in the briefs.

IAWC also moves to strike lines 2155 through 2179 in AG Exhibit 2.0, on this issue. There was cross examination on this testimony in the current docket. The parties are given until June 4, 2012 to file supplemental responses to update their arguments based on evidence adduced at the hearings in Docket 11-0767, if they wish to do so.

IAWC moves to strike lines 622-625, 628-633 and 645-669 in AG Exhibit 4.0. These lines are part of Mr. Smith's testimony about "Accumulated Deferred Income Tax – Repairs Deduction."

The motion is denied with respect to lines 628-633. It is appropriate to allow the expert witness to compare a determination on the issue in a cited decision by the West Virginia Public Service Commission in a case involving an affiliate of IAWC to that proposed by IAWC. The objections go to the weight, which may be further argued in the briefs.

The motion is also denied with respect to lines 622-625 and 645-669. While not technically involving an admission, it nevertheless seems appropriate under the circumstances to allow the expert witness to compare a position on the issue purportedly taken on the record by a water utility affiliate of IAWC in the cited proceeding to that proposed by IAWC in this proceeding. The objections go to the weight, which may be further argued in the briefs.

IAWC moves to strike lines 1051-1059 in AG Exhibit 4.0. These passages are part of Mr. Smith's testimony about "'Separate Return' and 'Consolidated Tax Savings' Concepts." Additional evidence on the issue was adduced at the hearings. The parties are given until June 4, 2012 to file supplemental responses to update their arguments based on evidence adduced at the hearings in Docket 11-0767, if they wish to do so.

Sincerely,

Elizabeth A. Rolando
Chief Clerk

EAR:cfr
Administrative Law Judge Jones

cc: Accounting
Mr. Kahle
Mr. Ostrander
Ms. Hathhorn
Ms. Selvaggio

Water
Mr. Johnson
Mr. Atwood

Ms. Freetly - Finance
Mr. Sackett – Energy

Kenneth C. Jones, Corporate Counsel
Illinois-American Water Company
300 N. Water Works Dr.
Belleville, IL 62223 *
mailto:kenneth.jones@amwater.com

John J. Reichart
Illinois-American Water Company
727 Craig Rd.
St. Louis, MO 63141 *
mailto:john.reichart@amwater.com

Albert D. Sturtevant, Anne M. Zehr
Rebecca L. Segal & Kathleen E. Ratcliffe
Attys. for Illinois-American Water Company
Whitt Sturtevant LLP
180 N. LaSalle St., Ste. 1822
Chicago, IL 60601 *
mailto:sturtevant@whitt-sturtevant.com
mailto:zehr@whitt-sturtevant.com
mailto:segal@whitt-sturtevant.com
mailto:ratcliffe@whitt-sturtevant.com

Mark A. Whitt
Atty. for Illinois-American Water Company
Whitt Sturtevant LLP
PNC Plaza, 20th Fl.
155 E. Broad St.
Columbus, OH 43215 *
mailto:whitt@whitt-sturtevant.com

Eric Robertson, Ryan Robertson
& Andrew Rankin
Atty. for IIVC
Lueders, Robertson, Konzen
1939 Delmar Ave., P.O. Box 735
Granite City, IL 62040 *
mailto:erobertson@lrklaw.com
mailto:ryrobertson@lrklaw.com
mailto:drankin@lrklaw.com

Susan L. Satter, Janice A. Dale
Cathy Yu & Timothy S. O'Brien
Illinois Attorney General's Office
11th Floor
100 W. Randolph
Chicago, IL 60601 *
mailto:ssatter@atg.state.il.us
mailto:jdale@atg.state.il.us
mailto:cyu@atg.state.il.us
mailto:tsobrien@atg.state.il.us

Richard C. Balough & Cheryl Dancey Balough
Attys. for Cities of Champaign & Urbana
Villages of Savoy, St. Joseph Sidney & Philo
Balough Law Offices, LLC
1 N. LaSalle St., Ste. 1910
Chicago, IL 60602 *
mailto:rbalough@balough.com
mailto:cbalough@balough.com

Joseph E. Hooker
Assistant City Attorney
City of Champaign
102 North Neil Street
Champaign, IL 61820 *
mailto:joseph.hooker@ci.champaign.il.us

Dennis Schmidt, Director
Public Works
City of Champaign
702 Edgebrook Dr.
Champaign, IL 61820 *
mailto:schmiddj@ci.champaign.il.us

Ralph Smith & Dawn Bisdorf
Larkin & Associates, PLLC
15728 Farmington Rd.
Livonia, MI 48154
mailto:rsmithla@aol.com
mailto:dawn.bisdorf@gmail.com

Michael Roomberg
Vice President - Equity Research
Ladenburg Thalmann & Co., Inc.
520 Madison Ave., 9th Fl.
New York, NY 10022
mailto:mroomberg@ladenburg.com

Karen S. White & Samuel T. Miller
Attys. for Federal Executive Agencies
USAF Utility Law Field Support Center
139 Barnes Dr.
Tyndall AFB, FL 32403 *
mailto:karen.white@tyndall.af.mil
mailto:samuel.miller@tyndall.af.mil

Jeffrey A. Mollet
Atty. for Bond-Madison Water Company
Silver Lake Group, Ltd.
PO Box 188
560 Suppiger Rd.
Highland, IL 62249 *
mailto:jeff@silverlakelaw.com

George A. Marchetti
& Jeffrey M. Alperin
Attys. for Village of Bolingbrook
Tressler LLP
305 W. Briarcliff Rd.
Bolingbrook, IL 60440 *
mailto:gmarchetti@tresslerllp.com
mailto:jalperin@tresslerllp.com

Kathleen Crossett
Illinois Attorney General's Office
100 W. Randolph St., 11th Fl.
Chicago, IL 60601
mailto:kcrossett@atg.state.il.us

Thomas Q. Smith, Case Manager
Illinois Commerce Commission
527 E. Capitol Ave.
Springfield, IL 62701 *
mailto:tsmith@icc.illinois.gov

Michael J. Lannon & Nicole T. Luckey
Office of General Counsel
Illinois Commerce Commission
160 N. LaSalle, Suite C-800
Chicago, IL 60601 *
mailto:mlannon@icc.illinois.gov
mailto:nluckey@icc.illinois.gov

James V. Olivero
Office of General Counsel
Illinois Commerce Commission
527 E. Capitol Ave.
Springfield, IL 62701 *
mailto:jolivero@icc.illinois.gov

Larry Jones
Administrative Law Judge
Illinois Commerce Commission
527 E. Capitol Ave.
Springfield, IL 62701 *
mailto:ljones@icc.illinois.gov